

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
No. 21-CV-4084

ANTHONY DAVEY,
Appellant,

v.

VERMONT DEP'T OF CORRECTIONS
Appellee.

RULING ON THE STATE'S MOTION TO DISMISS

Appellant Anthony Davey seeks review under 28 V.S.A. § 724 of a case staffing decision dated March 24, 2021. The State has filed a motion to dismiss, arguing that this case has become moot because Mr. Davey's one-year interruption of furlough has ended, he is now eligible for furlough, and the DOC is actively attempting to place him on furlough. Mr. Davey opposes dismissal because he hopes to establish that the DOC violated his due process rights in the course of revoking his furlough and, if successful, he would like to be returned to furlough immediately and have the furlough violation expunged from his record.

The procedures allegedly employed by the DOC in revoking Mr. Davey's furlough "reveal a bureaucracy that comes very close to the sort of 'procedural mockery' we have previously warned against." *Davey v. Baker*, 2021 VT 94, ¶ 22, 2021 WL 5991023.¹ The record of this case appears to show that Mr. Davey was returned to the facility from furlough on October 27, 2020, presumably for violating his furlough conditions. No notice of suspension hearing was held. He therefore could not have been found guilty of any violation of conditions. A case staffing—which could only have followed such a determination of guilt—was held on November 19, 2020. It was determined that he would spend one year on interrupt status. He was later charged with "escape," allegedly occurring on February 17, 2021, but referring to his conduct prior to October 27, 2020. After a notice of suspension hearing, he was found guilty of escape and several other violations of conditions that had never been asserted against him. Mr. Davey's November 19, 2020, case staffing was then "updated" on March 24, 2021. But there was no apparent substance to the update. It was determined that the original one-year interrupt would simply continue.

Mr. Davey sought to vindicate his rights by filing a petition for habeas corpus in

¹ Any facts that might provide some reasonable explanation for the DOC's conduct apparently were not developed in the Windsor case, as described on appeal, nor have they been developed here. The record of this case does not include many of the facts or allegations described in the appeal of the Windsor case, however. The court limits its analysis to the facts and allegations in the record of this case.

Windsor Superior Court. That court dismissed, concluding that Mr. Davey instead should have presented his due process claim in an appeal under 28 V.S.A. § 724 rather than under the rubric of habeas. See *id.* ¶ 13. The Supreme Court affirmed that ruling on appeal. *Id.* ¶ 17. The Supreme Court's decision is dated December 17, 2021. Mr. Davey's § 724 notice of appeal of the March 24, 2021 case staffing then was filed with the DOC and this court on December 27, 2021.

The court agrees with Mr. Davey that this case is not moot for the reason asserted by the State. If Mr. Davey were able to prove the due process violation he asserts against the State, it is possible that he could be entitled to an order of expungement.² It is therefore not clear that no controversy between the parties remains.

However, the face of the record clearly shows that the court lacks jurisdiction for a different reason. The objectionable case staffing occurred on March 24, 2021. Mr. Davey purports to have signed the notice of appeal on December 17, 2021, and it was filed on December 27, long after the 30-day appeal period had expired. See V.R.C.P. 74(b); V.R.A.P. 4(a)(1).

The court lacks jurisdiction on that basis and will dismiss for that reason. However, because Mr. Davey has not had a fair chance to brief this issue, dismissal will not take effect for 10 days. Mr. Davey shall file any objection to dismissal on this basis within 10 days, after which, if he does not, dismissal will be entered.

Order

The State's motion to dismiss is granted subject to a 10-day objection period as set forth above. If no objection is filed, dismissal will be entered, and the State shall submit a form of judgment. V.R.C.P. 58(d).

SO ORDERED this 4th day of April, 2022.



Robert A. Mello
Superior Judge

² The court declines to speculate as to whether, if such a violation were proved, he might be ordered to be returned to furlough *immediately*. As far as the record goes, it appears that the DOC is actively attempting to place him in the community at this time but has not yet found a safe and appropriate place for him.